

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Administrative Law Judge awarded claimant permanent partial general disability benefits based upon a thirty-four percent (34%) work disability and assessed the entirety of the Award against the Workers Compensation Fund. The Workers Compensation Fund requested the Appeals Board review the finding of Fund liability. That is the sole issue now before this Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, the Workers Compensation Fund is absolved of liability.

Claimant was initially injured on August 13, 1991 when he fell through the doorway of the airplane he was working on and injured his left arm and shoulder. Claimant sought treatment from Boeing Central Medical which eventually referred him to orthopedic surgeon Robert L. Eyster, M.D., who first saw claimant in September 1991. After initially taking him off work, Dr. Eyster later released claimant to return to work with restrictions. Because of his work restrictions, respondent reassigned claimant to its work pool where claimant could be accommodated. Claimant believes he transferred to work pool in October 1991 and then in November 1991 began to develop symptoms in his right elbow. Before August 13, 1991, claimant did not have any problems with either elbow. The Administrative Law Judge awarded claimant permanent partial disability benefits based upon a thirty-four percent (34%) work disability. The respondent and insurance carrier contend the Workers Compensation Fund is solely responsible for payment of that Award because "Dr. Zimmerman testified that claimant would not have developed the right epicondylitis condition, the permanent restrictions associated with both injuries as well as the resulting general body and work disability because of the bilateral nature of the injuries but for the initial left elbow injury".

The purpose of the Workers Compensation Fund is to encourage the employment of persons handicapped as a result of mental or physical impairments by relieving employers, totally or partially, of workers compensation liability resulting from compensable accidents suffered by these employees. *Morgan v. Inter-Collegiate Press*, 4 Kan. App. 2d 319, 606 P.2d 479 (1980); *Blevins v. Buildex, Inc.*, 219 Kan. 485, 487, 548 P.2d 765 (1976).

K.S.A. 44-566(b) provides:

"'Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:

.....

- (15) Loss of or partial loss of the use of any member of the body;
- (16) Any physical deformity or abnormality;
- (17) Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

An employer is wholly relieved of liability when the handicapped employee is injured or disabled or dies as a result of an injury and the injury, disability or the death probably or most likely would not have occurred but for the preexisting physical or mental impairment. See K.S.A. 1991 Supp. 44-567(a)(1).

An employer is partially relieved of liability when the handicapped employee is injured or is disabled or dies as a result of an injury and the injury probably or most likely would have been sustained without regard to the preexisting impairment but the resulting disability or death was contributed to by the preexisting impairment. See K.S.A. 1991 Supp. 44-567(a)(2).

In either situation, it is the employer's responsibility and burden to show it hired or retained the handicapped employee after acquiring knowledge of the preexisting impairment. K.S.A. 1991 Supp. 44-567(b) provides:

"In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto."

An employee, previously injured or handicapped, is not required to exhibit continued disability or to be unable to return to his former job in order to be a "handicapped" employee. Ramirez v. Rockwell Int'l, 10 Kan. App. 2d 403, 405, 701 P.2d 336 (1985). Further, mental reservation on the part of the employer is not required. See Denton v. Sunflower Electric Co-op, 12 Kan. App. 2d 262, 740 P.2d 98 (1987), aff'd 242 Kan. 430, 748 P.2d 420 (1988).

The provisions imposing liability upon the Workers Compensation Fund are to be liberally construed to carry out the legislative intent of encouraging employment of handicapped employees. Morgan v. Inter-Collegiate Press, *supra*.

Although provisions imposing liability upon the Workers Compensation Fund are to be liberally construed, the Workers Compensation Act should be interpreted in such a manner to carry out its primary and basic purposes. As indicated above, the Legislature created the Workers Compensation Fund for the basic and primary purpose of encouraging the employment of impaired individuals. Assessing liability against the Fund in situations where that primary purpose is not furthered is improper.

As indicated by the above cited statutes, Fund liability does not attach until there is a distinct, subsequent accidental injury. The Appeals Board finds the evidence fails to establish that claimant sustained a subsequent work-related accident after August 13, 1991. Although claimant developed epicondylitis in the right elbow sometime after October 1991, the evidence fails to establish whether the condition developed because of his work activities and, thus, constituted a new and subsequent work-related injury, or whether the condition developed for reasons other than work activities or as a natural consequence of the initial accident in August 1991. If the latter is true, the condition should be considered part and parcel of the initial injury and, therefore, the responsibility of the party who is responsible for the initial injury. Although respondent's Kenneth Zimmerman, M.D., testified the right elbow condition developed as a result of claimant's work activities, the Appeals Board finds that opinion lacked proper foundation because the doctor had no knowledge of the pertinent facts required to provide an opinion regarding causation. Although the doctor knew claimant was assigned to respondent's work pool, Dr. Zimmerman lacked the requisite knowledge of when claimant was reassigned, the job duties he performed, or the manner in which he performed those duties. The doctor did not examine claimant, although he did have claimant's regular hearing testimony to review. However, our reading of that transcript leads us to the conclusion that it lacks sufficient information for the doctor to properly formulate an opinion on causation.

Because the evidence fails to prove claimant was either impaired before the August 1991 accident or that his right elbow condition resulted from a subsequent and distinct work-related accident occurring after August 1991, the Workers Compensation Fund is not responsible for any portion of the Award entered in this proceeding.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark entered in this proceeding on March 6, 1995, and the Award Nunc Pro Tunc entered on March 7, 1995, should be, and hereby are, modified in that the Workers Compensation Fund is absolved of liability in this proceeding and that the respondent, The Boeing Co. - Wichita, is responsible for the entirety of the Award. All other findings and orders of the Administrative Law Judge are hereby adopted by the Appeals Board for purposes of this review.

IT IS SO ORDERED.

Dated this ____ day of July, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James A. Cline, Wichita, Kansas
Eric K. Kuhn, Wichita, Kansas
Kurt W. Ratzlaff, Wichita, Kansas
John D. Clark, Administrative Law Judge
David A. Shufelt, Acting Director